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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court Of The United States

October Term, 1986

THE CITY OF MONTGOMERY, et al.,
Petitioners,

vs.

STEPHEN A. EILAND,
Respondent.

ON APPEAL FROM THE
ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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Mayor Emory Folmar

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review a judgment of the Court of Appeals for the Eleventh Circuit reversing the Trial Court after the Trial Court made specific findings based on the evidence that a police officer's speech regarding the mayor of Montgomery and his running of City government, a poem's first subject, was constitutionally protected but that the police officer's speech regarding the Mayor's aides, the poem's second subject, was not, based on the evidence, constitutionally protected. Put another way, will the appellate court substitute its judgment for findings of fact made by the court that heard the evidence.

2. Should this Court grant certiorari to review a judgment of the Eleventh Circuit Court of Appeals when the Appellate court fails to adhere to the rulings of the United States Supreme Court on *Connick v. Myers,* 461 U.S. 138, 1035 S.Ct. 1684, 75 L.Ed.2d 708 (1983) and other cases involving First Amendment rights.

THE PARTIES

In the District Court and Eleventh Circuit Court of Appeals the parties were Stephen A. Eiland, Plaintiff-Appellant, Emory Folmar, Mayor of Montgomery, Alabama, Defendant-Appellee, and The City of Montgomery, Alabama, Defendant-Appellee. The same parties remain throughout this litigation.

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OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the Middle District of Alabama and the opinion of the Eleventh Circuit Court of Appeals are submitted as Appendix "A" and "B" to this Petition.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals is dated August 26, 1986. The Petition for Rehearing and Suggestion for Rehearing and En Banc Consideration was denied October 6, 1986.

This Court may grant certiorari under 28 USCA 1254.

STATEMENT OF THE CASE AND MATERIAL FACTS

This action was filed January 25, 1984 claiming violation of the First, Fifth and Fourteenth Amendments of the United States Constitution. The suit sought a permanent injunction, damages, and attorney fees. (Vol. 1 of 3, p. 8-17).

Answer was filed by Defendants denying violation of Plaintiff's rights and avering that the publishing of a poem which refers to fellow officers and superiors as rats, mice, dullards and two-faced violated police rules and regulations and showed disrespect for fellow officers and superior officers. (Vol. 1 of 3, p. 24). Request for jury trial was made. (Vol. 1 of 3, p. 26).

Motions for summary judgment were made by both Plaintiff and Defendants and denied as to all parties. (Vol. 1 of 3, p. 90).

The City-County Personnel Board was dismissed as a party on motion of Plaintiff. (Vol. 1 of 3, p. 95).

After pretrial, trial was held on April 2-5, 1985. (Vol. 3 of 3, p. 2-32). The Court, in response to motions for directed verdict issued its order in which he outlined the issues to be presented to the jury. (Vol. 1 of 3, p. 180-189). The Court charged the jury and held, based on the evidence, the poem had two subjects. (Vol. 2 of 3, p. 3-20). No exception was made to the instructions. (Vol. 2 of 3, p. 20). Verdict for Defendants followed jury deliberations. (Vol. 1 of 3, p. 210). The Court's order on jury verdict was entered. (Vol. 1 of 3, p. 214). This appeal followed. (Vol. 1 of 3, p. 222). After the case was briefed and argued the Court ordered the entire record transcribed and filed. Appellee filed an additional brief citing, for the first time, pages of the transcript that Appellant believed buttressed his position. Leave was granted for Appellee to reply. Reply was submitted after the transcript was returned to Appellee for citation of transcript pages. The Eleventh Circuit Court of Appeals reversed the Trial Court's determination that the poem contained two subjects, one of which was not protected speech. Petition for Rehearing and En Banc Consideration was filed on September 12, 1986 and denied October 6,

1986. This Petition for Writ of Certiorari followed the denial of Motion for Rehearing and En Banc Consideration.

The facts show that in the fall of 1983, Eiland was a corporal in the Montgomery Police Department. He filed a petition to intervene in a lawsuit pending in the United States District Court alleging race discrimination in employment practices. His petition to intervene was denied. He filed another action that is this case. He also posted, while on duty, the following poem:

> EMORY "AMIN" IS OUR RULING GOD
> WE FLINCH WHEN HE BLINKS, WE JUMP WHEN HE NODS
> THE POLICE DEPARTMENT ADSS [sic] ZEST TO HIS DAY
> MUCH TO OUR HAPPINESS?? NAY TO OUR DISMAY
> HE SELECTS CERTAIN MEN TO ESCORT HIM AROUND
> THESE ARE THE TRUE DULLARDS, I THINK MOST HAVE FOUND
> FOR THEY CANNOT FUNCTION WITHOUT EMORY'S ADVICE
> THEY ARE NO LONGER MEN, THEY'VE BEEN TRANSFORMED TO MICE
> I THINK THE WORD "RAT" APPLIES IN SOME CASES
> ESPECIALLY FOR THOSE FOND OF WEARING TWO FACES
> SO, DOWN WITH THE DICTATORSHIP AND DOWN WITH EMORY
> AND LIKE THE SLOGAN SAYS, LET'S MAKE HIM A MEMORY

The poem was posted in three separate places in the Police Department. The poem was posted three days before the mayoral election. Copies of the poem were found and removed by other officers. Within days an investigation disclosed that Eiland had posted the poem. He later admitted that he was responsible. Later, Eiland met with Mayor Folmar who had been re-elected Mayor and he was reassigned from corporal to

police officer. Mr. Eiland sued. Based on the evidence the Court found that Eiland's speech regarding the Mayor and his running of city government was the first subject of the poem and was constitutionally protected. He also found, based on the evidence that Eiland's speech regarding the Mayor's aides and favoritism with them was the second subject of the poem and not constitutionally protected.

The Court found from the evidence that the references to the Mayor were not disruptive of the Police Department. The Court further found that the evidence was different regarding the effect on the Police Department's operations in the poem's references to the Mayor's aides. The Court found from the evidence that:

> The poem was posted exclusively within the police department. The poem referred to members of the department as 'dullards', 'rats', and 'mice' and as 'wearing two faces.' Without question, the poem was directed to and was about persons with whom Eiland would normally be in contact in the course of his daily work. Indeed, the poem's intended audience and subject matter were Eiland's fellow police officers. The evidence further reflects that the poem had substantial potential for disharmony in the department. Many members of the department felt personally insulted by the strong language of the poem. In view of the specially recognized need for personal loyalty and confidence among members of the police department, this court must conclude that the poem had, at least, the potential to engender disharmony and mistrust among police officers, and thereby the potential to impede the proper functioning of the police department. Applying the *Pickering* balancing test, the court finds that the vituperative references in the poem to fellow officers were not constitutionally protected.

ARGUMENT

The three judge panel reversed the Trial Court for determining that the poem had two subjects, one of which was not protected speech. The Trial Court made specific findings on the evidence regarding the effect the poem's reference to the Mayor's aides had on the department. The Court found from the evidence that:

> The poem was posted exclusively within the police department. The poem referred to members of the department as 'dullards', 'rats', and 'mice' and as 'wearing two faces.' Without question, the poem was directed to and was about persons with whom Eiland would normally be in contact in the course of his daily work. Indeed, the poem's intended audience and subject matter were Eiland's fellow police officers. The evidence further reflects that the poem had substantial potential for disharmony in the department. Many members of the department felt personally insulted by the strong language of the poem. In view of the specially recognized need for personal loyalty and confidence among members of the police department, this court must conclude that the poem had, at least, the potential to engender disharmony and mistrust among police officers, and thereby the potential to impede the proper functioning of the police department. Applying the *Pickering* balancing test, the court finds that the vituperative references in the poem to fellow officers were not constitutionally protected.

The panel does not conclude the District Court's findings of fact are clearly erroneous. The panel does conclude that the finding of the District Court that the vituperative references in the poem to fellow officers as rats, mice, dullards and two faced was constitutionally protected. The panel concludes that the holding is "a narrow one" but that the Appellant's interest in expressing his views on the imminent political campaign via the poem in question outweighed the City's interest in suppressing that speech. That is to say that if there is a political campaign in progress, so long as the poem criticizes the mayor, then license is given to say or write anything about fellow

officers that one would care to say or write. The holding is that one can say what he chooses, no matter how slanderous and untrue about fellow officers, so long as he also criticizes the candidate in the same writing. This is not, and should not be the law.

When does the "campaign" begin. For the candidate who runs daily, does this mean the fellow officer can write as he pleases no matter how untrue his assertions as long as there is a political campaign? When does a campaign begin?

Petitioner argued that if part of the writing is constitutionally protected, and part not constitutionally protected, then the entire writing is constitutionally protected. The panel held that the poem had only one subject, not two as the District Court found. Respondents own counsel agreed with the Trial Court and that the matter was submitted to the jury as it was as a jury question. (Vol. 3 of 3, page 20 and 21). His co-counsel on appeal argued to the contrary.

The Trial Court very carefully considered *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). That case holds that if part of the poem was protected, and part not protected the entire writing was not protected. The District Court gave Respondent every benefit of doubt. He correctly charged the jury that if Respondent proved that the substantial motivating factor in the reassignment was Respondent's exercise of his first amendment right, then he could recover on his first amendment claim. The District Court charged in accord with the *Connick* standards and with the standards of *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The Court did not ignore the teaching of *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) when he charged the jury. The District Court made finding from the evidence that the references to the Mayor and his conduct of city business had little potential for disruption while the negative references to the Mayor's aides and bodyguards had a "substantial potential for disharmony in the department". This finding, based on the evidence is what the panel overturned. The panel concludes

that the District Court was wrong in finding the poem addressed two distinct subjects. The panel found this even though Appellants counsel agreed with the District Court's charge to the jury to that effect and agreed that the poem could be broken down and urged the Court to submit the matter to the jury as a jury question on whether the reassignment was due to a constitutionally protected subject (Vol. 3 of 3, page 21). The District Court did as Appellant suggested.

The panel concluded that the subjects of the poem were the Mayor and his conduct of city business and the Mayor and his conduct of the police department and that the latter subject had inherent in it criticism of members of the Police Department. Therefore, the poem in its entirety is protected. The poem referred to others in the department as rats, mice, dullards and two-faced The panel says that the Mayor used the word dullard as not being his aides. Nowhere does the panel cite any reference to the Mayor using the word rat, mice or two-faced as not being his aide.

The panel cited but did not follow *Connick, supra.* The District Court did follow *Connick, supra.* The District Court charged in accord with *Connick, supra.* There the Supreme Court sustained the termination of an employee of the Assistant District Attorney's office after she had conducted a questionnaire concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in superiors and whether employees felt persuaded to work in political campaigns. The reason for the termination was given as her refusal to accept a transfer. The Court examined the various cases that dealt with whether a termination was a constitutional violation. The lower court had held the reason for the termination was the questionnaire. The Fifth Circuit Court of Appeals affirmed the lower court decision holding the termination was a violation of the employee's 1983 rights. The Supreme Court in reversing both lower courts stated:

> The limited First Amendment interest involved here does not require that Connick tolerate actions which he reason-

> ably believed would disrupt the office, undermine his authority, and destroy close relationships. Myer's discharge therefore did not offend the first amendment."
>
> To presume that all matters that transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs.

Mr. Eiland's reference to his superiors as rats, mice, dullards, and two-faced went far beyond Ms. Connick's objections to the questionnaire inquiring as to whether or not employees "had confidence in and would rely on the word" of various supervisors and concerning whether there was pressure to work in political campaigns. Mr. Eiland went beyond this, even if he was commenting on matters of public concern. Mr. Eiland thought that the reference to his superiors as rats, mice, dullards and two-faced was funny, but that fact does not mean that he is free to name call as he pleases. The fact that officers superior to Mr. Eiland who have at one time served as aides to the Mayor are not political office holders does not make his speech any more protected. Those officers were not selected for political reasons. Just as in *Connick,* the mere fact that there was a reference to the Mayor in the poem does not give Mr. Eiland license to say what he pleases about others. He cannot claim constitutional privilege to call his superiors rats mice, dullards and two-faced just because he also refers to the Mayor in his published announcement called a poem.

The *Connick* court also noted as relevant the time, place and manner in which the questionnaire was distributed. Mr. Eiland chose to publish his announcement in three places in the Police Department. On duty police were expected to see it. Unlike *Pickering v. Board of Education,* 391 U.S. 563, 20 L.Ed. 2d 811, 88 S.Ct. 1731, Eiland and Myers spoke or wrote at a place of their work, a fact which supports the fears that the

functioning of leadership in the Police Department was dangered by Mr. Eiland.

The panel selected only portions of the testimony in finding that the department's concern for disruption was abstract. The Supreme Court has emphasized that a reasonable likelihood of disruption of public services may be sufficient to support the State's interest in reasonably restricting the employee's speech. There is certainly no necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of the working relationship is manifest before taking action, abstract or not. See *Connick v. Myers, supra,* 103 S.Ct. at page 1692, also *McMullen v. Carson,* 754 F.2d 936, 939-40 (11th Cir. 1985). As the Trial Court pointed out, the public employer here was the Montgomery Police Department. The Eleventh Circuit has recognized that "the First Amendment does not protect personal behavior in the law enforcement context to the same extent that it does in other areas of governmental function" because of the special "need for higher morale and internal discipline in a police force". See *McMullen v. Carson, supra,* also see *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982). The Trial Court found the need for discipline was verified. The reference to the Mayor, however, did not insulate the remaining aspects of the poem which made the remarks about the Mayor's aides. He indicated that Eiland's remark about him did not offend him but his aides would have been offended by being referred to as rats, mice, dullards and two-faced.

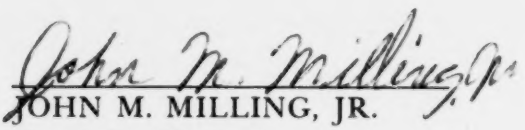
The District Court went on to state that the poem had a substantial potential for disharmony in the Police Department and many members of the Department felt personally insulted by the strong language of the poem. In view of the specially recognized need for personal loyalty and confidence among members of the Police Department, the Court went on to conclude that the poem had at least a potential to engender disharmony and mistrust among police officers and thereby the potential to impede the proper functioning of the Police Department. In applying the *Pickering* test the Court found the

references in the poem to fellow officers was not constitutionally protected. This finding of fact should not be overturned unless clearly erroneous and it is not clearly erroneous in this instance. The fact that Mr. Eiland intended the poem as humorous and intended it as a political poem does not give him constitutional protection. The Court pointed out that Mr. Eiland has a right to speak out but that for his speech to be constitutionally protected he must do so in a manner and at a time and place which will not duly undermine the operations of the Police Department. See *Connick v. Myers, supra* and *Pickering v. Board of Education, supra.* His finding of fact should not be overturned.

CONCLUSION

The panel misapplied the law to the findings of fact rendered by the District Court. The panel erred in reversing the District Court and holding the reassignment constitutionally impermissible.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, John M. Milling, Jr., a member of the Bar of the Supreme Court of the United States and the Attorney for the City of Montgomery and Emory Folmar, do hereby certify that I have served a copy of the foregoing upon all counsel of record in this cause by placing same in the United States Mail, postage prepaid, this 5th day of January, 1987 and addressed as follows:

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN A. EILAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 84-T-120-N
THE CITY OF MONTGOMERY, etc., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

Plaintiff Stephen A. Eiland has brought this lawsuit charging that the City of Montgomery, Alabama and its mayor disciplined him for posting a poem at the city police department. The issue now before the court is whether Eiland's poem was constitutionally protected speech under the first and fourteenth amendments to the United States Constitution.

I.

In the fall of 1983, Eiland was a corporal in the Montgomery Police Department. At about this time, he filed a petition to intervene in a lawsuit pending in this court alleging race discrimination in the employment practices of the police department. Eiland's petition alleged that promotions in the police department were based on political favoritism in violation of the first amendment. The petition to intervene was denied, and Eiland challenged the promotions in a new action that is now before the court in another cause.

Also in the fall of 1983, the mayor of the city, Emory Folmar, was running for reelection. The promotion practices of the police department were an issue in the mayoral campaign.

On October 8, 1983, three days before the mayoral election, Eiland while on duty posted copies of the following poem in three different locations in the police department:

EMORY "AMIN" IS OUR RULING GOD
WE FLINCH WHEN HE BLINKS, WE JUMP WHEN HE NODS
THE POLICE DEPARTMENT ADSS [sic] ZEST TO HIS DAY
MUCH TO OUR HAPPINESS??? NAY TO OUR DISMAY
HE SELECTS CERTAIN MEN TO ESCORT HIM AROUND
THESE ARE THE TRUE DULLARDS, I THINK MOST HAVE FOUND
FOR THEY CANNOT FUNCTION WITHOUT EMORY'S ADVICE
THEY ARE NO LONGER MEN, THEY'VE BEEN TRANSFORMED TO MICE
I THINK THE WORD "RAT" APPLIES IN SOME CASES
ESPECIALLY FOR THOSE FOND OF WEARING TWO FACES
SO, DOWN WITH THE DICTATORSHIP AND DOWN WITH EMORY
AND LIKE THE SLOGAN SAYS, LET'S MAKE HIM A MEMORY

Within a few hours, all copies of the poems had been found and removed by other police officers. The officers notified their superiors, and an investigation began into who had posted the poem. Within a certain number of days, Eiland was identified.

Eiland's division commander then met with Eiland who admitted that he had posted the poem. The commender arranged for Eiland to meet with Mayor Folmar.

On October 24, 1983, after Folmar had been reelected mayor, Eiland met with Folmar. At this meeting, Folmar disciplined Eiland for writing the poem by reassigning him from corporal to police officer. This lawsuit ensued.

II.

It is now settled that a public employer cannot condition employment on a basis that infringes an employee's constitutionally protected interest in free speech. *Connick v. Myers,* 461 U.S. 138, ____, 103 S.Ct. 1684, 1687 (1983). When a public employee alleges that adverse personnel action resulted from such speech, the employee must show first that the speech was constitutionally protected and second that it was a substantial motivating factor in the adverse personnel action. *Mount Healthy City School District v. Doyle,* 429 U.S. 274, 288, 97 S.Ct. 568, 576 (1977). If the employee makes this proof, the employer must show that the action would have been taken even in the absence of the protected speech, or the employee prevails. *Id.*

Whether an employee's speech is constitutionally protected is an issue of law for the court to resolve. *Connick v. Myers,* 461 U.S. at ____ n.7, 103 S.Ct. at 1690 n.7; *Jones v. Dodson,* 727 F.2d 1329, 1334 (4th Cir. 1984); *Loya v. Desert Sands Unified School District,* 721 F.2d 279, 281 (9th Cir. 1983).

A.

In resolving this issue, the first and preliminary inquiry is whether the employee's speech touched upon "a matter of public concern." *Connick v. Myers,* 461 U.S. at ____, 103 S.Ct. at 1689-90; *Jones v. State of Georgia,* 725 F.2d 622, 624 (11th Cir. 1984). There are several factors a court may consider in deciding this. One of them

> is the subject-matter of the speech or action. If the speech relates primarily to a matter of "limited public interest" and does not "seek to bring to light actual or potential wrongdoing or breach of public trust," centering instead on matters primarily, if not exclusively, "of personal interest" to the employee such as employee grievances over internal working conditions, etc., that fact must be weighed in determining whether a matter of true public concern is involved. . . .

Jurgensen v. Fairfax County, Va., 745 F.2d 868, 879 (4th Cir.

1984), *quoting Connick v. Myers,* 461 U.S. at ....., 103 S.Ct. at 1691.

The evidence before the court reflects that the poem, which by all accounts led Mayor Folmar to reassign Eiland, had two principal and distinct subjects. In considering whether Eiland's speech touched upon a matter of public concern, it is appropriate under the circumstances of this case to consider each of its subjects separately. *See Connick v. Myers,* 461 U.S. at ....., 103 S.Ct. at 1690-91 (some questions in a questionnaire are of public concern; some are not).

The first subject of the poem was Mayor Folmar and his purported manner of running city government. The poem suggested that the mayor exerts dictatorial authority. The poem also referred to a campaign bumper sticker — "Let's Make Emory a Memory" — calling for the mayor's electoral defeat.

The second subject of the poem was the mayor's aides or bodyguards and the purported political favoritism that the mayor practiced in selecting them to serve as aides and then in further promoting them in the ranks of the police department. The poem suggested that the aides were intimidated by the mayor and sometimes informed him of political as well as personal disloyalty by other police officers.

Based upon the evidence, the court finds that the first subject of the poem was a matter of public concern. Certainly, the manner in which the mayor runs city government was of public concern. This would be the case whenever the subject is raised. Eiland's poem came just days before the mayoral election. At such a time, how the incumbent candidate ran the city government was at the heart of public concern.

The second subject of the poem was also a matter of public concern. In *Connick v. Myers,* the Court reaffirmed that "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." 461 U.S. at ....., 103 S.Ct. at 1691. Therefore, the Court said, an employee's allegation that a public employer pressured employees to campaign on his behalf was of public concern. *Id.* Such an allegation was the second subject

of the poem. According to the evidence, the poem was written and read as saying that the mayor required strict personal loyalty from his aides and expected them to report any disloyalty of him expressed by other police officers. A lawsuit pending in this court at the time the poem was posted alleged such favoritism as an example of unlawful promotion practices in the police department. Newspaper articles at the time reported the allegations prominently. During the mayoral race, the challenging candidate made favoritism in the police department a campaign issue.

On this basis, the court concludes that Eiland's speech about both the mayor and the mayor's aides was of public concern. Again, ". . . the First Amendment's primary aim is the full protection of speech upon issues of public concern. . . ." *Connick v. Myers,* 461 U.S. at ....., 103 S.Ct. at 1694. Thus, Eiland's speech fell within the scope of the first amendment.

B.

Having made this determination, the court must next consider whether the subjects of Eiland's poem were constitutionally protected according to the so-called *Pickering* balance. *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731 (1968). According to this test, "[w]hether a public employee's speech is constitutionally protected is determined by a balancing of the employee's interest in free speech and the state's interest in promoting the efficiency of the public services performed through its employees." *Berdin v. Duggan,* 701 F.2d 909, 912 (11th Cir. 1983). Factors to weigh in the balance are: whether speech is directed to people with whom the speaker "would normally be in contact during the course of his daily work"; whether it had an adverse effect on "discipline by intermediate supervisors or harmony among coworkers"; whether the employment relationship in question is "the kind . . . for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning" and whether the statements "have in any way impeded [the em-

ployee's] proper performance of his daily duties . . . or . . . interfered with the regular operations of the [office]." *Pickering*, 391 U.S. at 568-73, 88 S.Ct. at 1734-37.

The Supreme Court has further emphasized that a reasonable likelihood of disruption of public services may be sufficient to support the state's interest in reasonably restricting an employee's speech. There is no "necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick v. Myers*, 461 U.S. at ___, 103 S.Ct. at 1692. *See McMullen v. Carson*, 754 F.2d 936, 939-40 (11th Cir. 1985).

The court would first note that the public employer here was the Montgomery Police Department. "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. at ___, 103 S.Ct. at 1692. The Eleventh Circuit has therefore recognized that the "First Amendment does not protect personal behavior in the law enforcement context to the same extent that it does in other areas of Governmental concern" because of the special "need for high morale and internal discipline in a police force." *McMullen v. Carson*, 754 F.2d at 939-40. *See also Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982).

The court would also note that the *Pickering* balance is itself influenced by the extent to which the employee's speech is of public concern. A "stronger showing [of disruption of public administration] may be necessary if the employee's speech more substantially involved matters of public concern." *Connick v. Myers*, 461 U.S. at ___, 103 S.Ct. at 1692-93. The court has found that the subjects of Eiland's poem were of great public concern, especially in the midst of the mayoral election. The court applies the *Pickering* balance accordingly.

Based upon the evidence, the court finds first that Eiland's speech regarding the mayor and his running of city government, the poem's first subject, was constitutionally protected, but that Eiland's speech regarding the mayor's aides and the

mayor's favoritism with them, the poem's second subject, was not constitutionally protected.

Mayor Folmar testified that there was no disruption of the police department's operations as a result of Eiland's speech about the mayor and his running of the city government. Although disliking the phrase "Emory Amin," Mayor Folmar said that he is accustomed to being called names, and this name did not hurt his self-esteem or his reputation. Again, the poem came amidst a mayoral election, a time the mayor acknowledged as one for name calling. The evidence was that, when Mayor Folmar met with Eiland about the poem, he indicated to Eiland that he thought his aides should take offense, not himself.

The testimony of other officers confirmed that the poem's references to the mayor did not disrupt the police department. The officers said that the poem did not lead them to lose respect for the mayor. Furthermore, the evidence was that Eiland and the mayor were not normally in daily contact in the course of their work.

The evidence was different regarding the effect on the police department's operations of the poem's references to the mayor's aides. The poem was posted exclusively within the police department. The poem referred to members of the department as "dullards," "rats," and "mice" and as "wearing two faces." Without question, the poem was directed to and was about persons with whom Eiland would normally be in contact in the course of his daily work. Indeed, the poem's intended audience and subject matter were Eiland's fellow police officers. The evidence further reflects that the poem had substantial potential for disharmony in the department. Many members of the department felt personally insulted by the strong language of the poem. In view of the specially recognized need for personal loyalty and confidence among members of a police department, this court must conclude that the poem had, at least, the potential the engender disharmony and mistrust among police officers, and thereby the potential to impede the proper functioning of the police department. Applying the *Pickering* balancing

test, the court finds that the vituperative references in the poem to fellow officers were not constitutionally protected.

Eiland argues that the poem was intended in jest, as a humorous political poem. It is apparent from the poem that it was intended to be humorous. But strong, vituperative humor may also be potentially disruptive, and the evidence in this case is that the humor was disruptive to the extent it referred to the mayor's aides.

The court is compelled to add that Officer Eiland has a constitutional right to speak out, both publicly and privately, against the promotion practices of the Montgomery Police Department. However, for his speech to be constitutionally protected he must do so in a manner and at a time and place which do not unduly undermine the operation of the police department. The law as now established so restricts his verbal conduct. *Connick v. Myers, supra; Pickering v. Board of Education, supra.*

III.

The court having determined that Eiland's speech was, in part, constitutionally protected as a matter of law, the issue is then whether such protected speech was the basis for the adverse action against Eiland. *Mount Healthy City School District v. Doyle,* 429 U.S. at 288, 97 S.Ct. at 576. This is an issue of fact and, as such, one for the jury to determine. *Jones v. Dodson,* 727 F.2d 1329, 1337 (4th Cir. 1984); *Loya v. Desert Sands Unified School District,* 721 F.2d 279, 282 (9th Cir. 1983).

The evidence is substantially in dispute as to whether Mayor Folmar disciplined Eiland because of the poem's references to the mayor or because of its references to other police officers. If Folmar disciplined Eiland because of the poem's reference to the mayor, then Eiland would have been disciplined for engaging in constitutionally protected speech. This result would be constitutionally impermissible. However, if Folmar disciplined Eiland because of the poem's reference to other police

officers, then Eiland would have been disciplined for engaging in constitutionally unprotected speech. This result would not be prohibited by the first amendment.

The court will therefore put to the jury whether Folmar disciplined Eiland because Eiland criticised Folmar. The jury will be required to apply the *Mount Healthy* test to the evidence in this case as follows: Eiland must establish that his political criticism of Folmar was a substantial motivating factor in Folmar's decision to discipline him. If Eiland makes this proof, then Folmar and the city must show that the disciplinary action would have been taken even in the absence of Eiland's criticism of Folmar. *Mount Healthy City School District v. Doyle,* 429 U.S. 274, 288, 97 S.Ct. 568, 576 (1977).

Accordingly, for the above reasons, it is ORDERED that the poem be posted by plaintiff Stephen A. Eiland was constitutionally protected to the extent it referred to defendant Emory Folmar, the mayor of the City of Montgomery; and that the poem was not constitutionally protected to the extent it referred to other officers in the Montgomery Police Department.

DONE, this the 4th day of April, 1985.

/s/ MYRON H. THOMPSON

United States District Judge

Stephen A. EILAND, Plaintiff-Appellant,

v.

The CITY OF MONTGOMERY, a municipal corporation; and Emory Folmar, Individually and in his official capacity as Mayor of the City of Montgomery, Defendants-Appellees.

No. 85-7295.

United States Court of Appeals, Eleventh Circuit.

Aug. 26, 1986.

Police officer brought action against city claiming he was unconstitutionally demoted from his position as police corporal in derogation of his First Amendment right to free speech. The United States District Court for the Middle District of Alabama, 84-T-120-N, Myron H. Thompson, J., entered judgment on jury verdict in favor of city, and police officer appealed. The Court of Appeals, Morgan, Senior Circuit Judge, held that poem criticizing mayor during election year posted by police officer in police station was protected speech in its entirety.

Reversed and remanded.

1. Constitutional Law 90.1 (7)

Employee must demonstrate that speech causing his employment difficulties was both constitutionally protected and was "substantial motivating factor" in adverse employment decision, in order to prevail on First Amendment claim. U.S.C.A. Const.Amend. 1.

2. Constitutional Law 90.1 (7)

Burden shifts to employer to demonstrate by preponderance of evidence that adverse employment action would have transpired even in absence of protected speech, once employee demonstrates that speech causing his employment difficulties was both constitutionally protected and was "substantial motivating factor" in employment decision. U.S.C.A. Const.Amend. 1.

3. Constitutional Law 90.1 (7.2)

Potential disruptive effect of poem criticizing mayor during election year posted in police station by police corporal, considered in its entirety rather than focusing on each "subject" of poem individually, was not sufficient to outweigh police corporal's interests in speaking, and thus speech was protected. U.S.C.A. Const.Amend. 1.

4. Federal Courts 937

Retrial was not required to determine whether police department would have demoted police corporal notwithstanding his posting poem in police station criticizing mayor, which was determined on appeal to be protected speech, in connection with police corporal's claim that he was unconstitutionally demoted from position in derogation of his First Amendment right to free speech, where evidence was uncontradicted that poem was cause of demotion. U.S.C.A. Const.Amend. 1.

Appeal from the United States District Court for the Middle District of Alabama.

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

MORGAN, Senior Circuit Judge:

Appellant Stephen A. Eiland appeals from an adverse jury verdict on the merits of his claim that he was unconstitutionally demoted from his position as police corporal in derogation of his first amendment right to free speech. The adverse employment action against Eiland arose from an incident occurring shortly before the City of Montgomery, Alabama mayoral election, when Eiland posted a humorous poem in three locations in the police station criticizing Mayor Emory Folmar and his police "bodyguards." The district court determined that to the extent the poem criticized Mayor Folmar, it was constitutionally protected speech, but to the extent that it criticized

the police bodyguards, it was not constitutionally protected speech. The court similarly charged the jury that only the poem's references to the mayor were protected speech, while the poem's references to the aides were not protected. The court then submitted to the jury the limited question of whether Eiland's demotion stemmed from his constitutionally protected criticism of the mayor, to which the jury responded in the negative. The appellant now challenges the district court's determination to treat the poem as containing two subjects, one of which was not protected speech. We reverse and remand for further proceedings.

I.

At the time of the incident in question, appellant Stephen Eiland was a corporal in the City of Montgomery, Alabama, police department. In September of 1983, Eiland filed a petition to intervene in a race discrimination suit pending in the Middle District of Alabama regarding employment practices of the police department. His petition alleged that promotions in the police department were based on political favoritism in violation of the First Amendment. Another officer subsequently joined the petition to intervene, with the matter receiving coverage in the local Montgomery press. Eiland's petition to intervene was denied, although his political favoritism claim subsequently was filed as another independent suit.

During the same time frame in the fall of 1983, Mayor Emory Folmar was running for re-election. The lower court found, and it is clear from the record, that the promotional practices of the police department under Folmar were an issue in the mayoral campaign.[1] Three days before the mayoral election, appellant Eiland typed a poem on a typewriter located in

[1]In addition to the interest sparked by the activities of the appellant and his fellow officer, during this same time period the local Fraternal Order of Police unit voted to have the promotional practices of the police department investigated by persons from its national office. [Rec. at 369; 650-51]. As many witnesses testified, the promotional practices of the police department were matters of common conversation and interest.

the police department and posted that poem in three locations within the building while entering duty later that day. Eiland actually authored only the last two lines of the poem, which read in its entirety as follows:

EMORY "AMIN" IS OUR RULING GOD
WE FLINCH WHEN HE BLINKS, WE JUMP WHEN HE NODS
THE POLICE DEPARTMENT ADDS ZEST TO HIS DAY
MUCH TO OUR HAPPINESS??? NAY! TO OUR DISMAY
HE SELECTS CERTAIN MEN TO ESCORT HIM AROUND
THESE ARE THE TRUE DULLARDS, I THINK MOST HAVE FOUND
FOR THEY CANNOT FUNCTION WITHOUT EMORY'S ADVICE
THEY ARE NO LONGER MEN, THEY'VE BEEN TRANSFORMED INTO MICE
I THINK THE WORD "RAT" APPLIES IN SOME CASES
ESPECIALLY FOR THOSE FOND OF WEARING TWO FACES
SO, DOWN WITH THE DICTATORSHIP AND DOWN WITH EMORY
AND LIKE THE SLOGAN SAYS, LET'S MAKE HIM A MEMORY

The poem was posted on bulletin boards in the police department break room, the Criminal Investigative Division office, and in a public elevator. The poems were brought to the attention of supervisory personnel shortly thereafter and were removed within approximately one and one half hours.

Almost immediately an investigation was instigated to attempt to discover who was responsible for disbursement of the poems. Lieutenant R. Ward and Sergeant D. Shaner each testified to having spent between two and three hours investigating the matter. Approximately two weeks later, it was determined that Eiland was responsible for posting the poems. After being questioned as to his involvement, the appellant filed a

short report at the request of his superiors outlining his responsibility. Shortly thereafter, he requested and received the opportunity to discuss the matter with Mayor Folmar. After that meeting, Eiland was reassigned from his position as corporal to police officer. This suit ensued.

The only claim tried below was the appellant's assertion that he suffered adverse employment action in retribution for the exercise of his first amendment rights in publicizing the poem in question. The only question submitted to the jury was whether the appellant was disciplined for engaging in constitutionally protected speech to the extent that the poem criticized the mayor. The jury returned a general verdict answering in the negative. The appellant filed this timely appeal.

II.

[1, 2] In order to prevail on a first amendment claim, a plaintiff must first demonstrate that the speech causing his employment difficulties was both constitutionally protected and was a "substantial motivating factor" in the employment decision. If established, the burden then shifts to the defendant to demonstrate by a preponderance of the evidence that the adverse action would have transpired even in the absence of the protected speech. *See Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). *See also Berry v. Bailey,* 726 F.2d 670 (11th Cir. 1984), *cert. denied,* ..... U.S. ....., 105 S.Ct. 2326, 85 L.Ed.2d 844 (1985).

The *Mt. Healthy* equation was most recently refined by the Supreme Court in *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). *Connick* involved a situation where Myers, an employee of a state district attorney's office, became disgruntled with her impending transfer to another division of the office. Shortly after the transfer, she prepared and distributed a questionnaire to her fellow employees seeking their views on numerous topics, such as the office transfer policy and their opinions of their supervisors. Viewing Myers'

actions as the cause of a "mini-insurrection" among her co-workers, Connick terminated her. The *Connick* court noted that the initial task was to determine whether Myers' speech involved a matter of public interest, for if it did not, surveying the propriety of her discharge under the First Amendment was inappropriate. *Id.* at 146, 103 S.Ct. at 1689, 75 L.Ed.2d at 719-20. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690, 75 L.Ed.2d at 720. The Court concluded that only one question on Myers' questionnaire concerned matters of public concern, its real thrust being Myers' personal disgruntlement over her transfer. *Id.* Nevertheless, the Court went on to examine whether her discharge was justified inasmuch as that one question touched a matter of public concern.

The Court then applied the balancing test set forth in *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) to determine whether the employer's actions were justified.[2] In striking the balance in favor of Con-

[2]In *Pickering,* the Court stated: "The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1734-35, 20 L.Ed. 2d at 817. *Pickering* involved a case where a teacher was dismissed after sending a letter to a local newspaper that was critical of the way in which the school system officials had handled past revenue programs. Although finding that the teacher's speech was protected thus insulating him from dismissal, the Court emphasized that it was impossible to lay down a steadfast rule against which the first amendment rights of all public employees may be judged due to the vast variety of factual scenarios in which those statements will arise. Rather, the Court indicated that the previously mentioned balance must be struck under the particular facts of any given case. *Id.* at 568-570, 88 S.Ct. at 1734-1735, 20 L.Ed.2d at 817-18. The factors considered by the court included whether the statements impeded the ability of the speaker's superiors to maintain discipline or harmony among co-workers; whether personal loyalty and confidence were necessary to the proper functioning of the working relationship; and the extent and degree to which the speech touched matters of legitimate public concern. The *Pickering* court concluded that the case before it involved "a teacher [who]

nick, the Court emphasized that efficient operation of the district attorney's office required close working relationships. Furthermore, the Court considered significant the manner, time and place in which the questionnaire was distributed, bolstering its conclusion by noting that Myers exercised her expression at the office. *Id.* 461 U.S. at 153, 103 S.Ct. at 1693, 75 L.Ed.2d at 724. Finally, the Court emphasized that this dispute arose out of Myers' individual grievance with Connick regarding her transfer, which strengthened Connick's contention that Myers was actually challenging his authority to run the office. In short, the result in *Connick* to a large degree appears to be grounded in the Court's conclusion that Myers' questionnaire involved matters of public concern in only a "most limited sense." *Id.* at 154, 103 S.Ct. at 1693-94, 75 L.Ed.2d at 724.

III.

[3] In the instant case, the lower court struck the *Pickering* balance in favor of the mayor. The court initially determined that the poem had two principal and distinct subjects. The first subject was "Mayor Folmar and his purported manner of running city government." The second subject was "the mayor's aides or bodyguards and the purported political favoritism that the mayor practiced in selecting them to serve as aides and then in further promoting them in the ranks of the police department." Working from this premise, the lower court determined that both subjects were matters of legitimate public concern.[3] In continuing on to apply the *Pickering* balancing test

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has made erroneous public statements upon issues then currently the subject of public attention, which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.* at 572-73, 88 S.Ct. at 1736-37, 20 L.Ed. 2d at 819-20. Under such circumstances, the Court determined that the teacher's interest in free expression outweighed the school system's interest in limiting that speech.

[3]The appellee's brief does not appear to challenge this finding, which appears to be beyond dispute based upon this record. Inasmuch as the substantial motivating factor component of the *Mt. Healthy* equation was

to each subject separately, the court focused upon the potential disruptive effect of each subject upon the operation of the police department. The court found that the references to the mayor and his conduct of city business had little potential for disruption, while the negative references to the mayor's aides and bodyguards had a "substantial potential for disharmony in the department." Consequently, the court determined that only the first subject – the mayor himself and his running of city government – was "constitutionally protected."[4]

Based upon our review of the record,[5] we are convinced that

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also beyond dispute, *see infra* text accompanying note 12, we proceed directly to the *Pickering* balancing test. *See Ferrara v. Mills,* 781 F.2d 1508, 1512-14 (11th Cir.1986).

[4]The district court incorrectly concluded that the outcome of the *Pickering* balancing test determines whether speech is constitutionally protected. As we explained in *Ferrara v. Mills,* 781 F.2d 1508, 1513-14 (11th Cir. 1986):

> The question of whether the employee's speech is constitutionally protected is a different issue from the ultimate question of whether the employer has violated the employee's right to freedom of speech. . . . The *Pickering* balance is not triggered unless it is first determined that the employee's speech is constitutionally protected. If the employee's speech does not relate to matters of public concern, then the employee has no first amendment interest against which the employer's interest need be weighed.

The first inquiry under *Connick,* therefore, is to determine whether speech touches matters of public concern and is constitutionally protected solely by consideration of "the content, form, and context of a given statement, as revealed by the whole record." *Id., quoting Connick,* 461 U.S. at 147-48, 103 S.Ct. at 1690, 75 L.Ed.2d at 720. If speech is constitutionally protected under that test, then the court's task is to weigh the employer's interest in the efficient operation of the public office against the employee's interest in the constitutionally protected speech utilizing the *Pickering* equation. 781 F.2d at 1514. Although the district court applied *Connick* and *Pickering* in this sequence to each subject of the poem, the court was technically in error in concluding that the outcome of the *Pickering* test determined whether the speech was "constitutionally protected." The outcome of the *Connick* public interest test determines whether speech is constitutionally protected; the outcome of the *Pickering* balancing test determines whether the public employer's interests override the employee's interests in that constitutionally protected speech.

[5]The question whether particular speech is constitutionally protected is one of law for the court. Consequently, we are obliged to survey the rec-

the district court started its analysis on the wrong foot by determining that the poem had two distinct and separable subjects. The lower court justified its decision to treat the poem as having two subjects as grounded in the *Connick* decision. In that case, the Supreme Court apparently examined each question of Myers' questionnaire to determine whether they touched upon matters of public concern. The Court found that all but one question concerned matters personal to Myers, but inasmuch as one question did concern a matter of public interest, the Court went on to decide whether the employer's action was justified. The *Connick* decision, however, did not apply the *Pickering* balancing test to each individual question contained in the questionnaire, but rather the Court appeared to weigh the first amendment interests of Myers in the questionnaire as a whole against the interests of Connick. We do not read *Connick* as requiring that each subject of the poem be individually weighed against Folmar's interests under *Pickering.*

Rather, it appears that in most instances speech of a public employee will have aspects or subjects that are worthy of paramount protection under the First Amendment, as well as aspects or subjects that are not worthy of such heightened protection. The task under *Pickering* is to balance those competing interests and to determine whether the employee's interests in the speech as a whole outweigh the public employer's interests.[6]

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ord in order to make our own "independent constitutional judgment on the facts of the case" in determining whether that speech is worthy of first amendment protection. *See Connick,* 461 U.S. at 150 n. 10, 103 S.Ct. at 1692 n. 10, 75 L.Ed.2d at 722, n. 10 *quoting, Jacobellis v. Ohio,* 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793 (1964) (Brennan, J.). *See also McMullen v. Carson,* 754 F.2d 936, 938 (11th Cir.1985) (in reviewing factual findings in First Amendment cases, court uses an independent examination of the record and is not bound by the clearly erroneous standard).

[6]We draw further support in this regard from *Berry v. Bailey,* 726 F.2d 670 (11th Cir.1984). *Berry* involved a situation where a police officer was fired allegedly in retaliation for his speech in relation to an incident involving political supporters of the sheriff. The speech in question involved five different instances of statements made by the officer to various per-

The approach taken by the district court here shortcircuited that balancing process by avoiding the hard choices inherent in the *Pickering* equation. It is rather easy to conclude that speech criticizing the mayor with whom the speaker has little or no contact may not be suppressed, while related speech criticizing other officers associated with the mayor with whom the speaker might have some contact may be suppressed. The difficult choice is to recognize that the same speech may simultaneously do both, and to resolve all of those competing interests.

This is not to say, of course, that in the proper case speech cannot have two distinct subjects. To hold otherwise, as the appellee observes, would be to grant a license to a speaker to join two totally unrelated subjects in an effort to obtain the protective shield of the First Amendment as to the entirety of the speech. But the instant case is not such a case. The real problem here is that the district court's conclusion that the poem addressed two distinct subjects is simply not justifiable. Both purported subjects, even in the words of the district court, are directed at the mayor – the first involves the mayor and his general conduct of city business; the second involves the mayor and his conduct of the police department. As part of the latter subject, some criticism of members of the police department is inherent. Yet the thrust of the poem, both from its wording and from the context from whence it arose as being posted three days prior to the mayoral election, focuses upon criticism of the mayor.

This case boils down to the question of whether the appellant's interest in criticism of the mayor in the heat of a political

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sons. The court observed that four of the statements in question involved the officer's failure to follow the orders of his superior, the sheriff. Those statements clearly were not protected under *Pickering*. The last statement involved critical remarks concerning a supporter of the sheriff. The court determined that "even if that remark might be constitutionally protected according to the *Pickering* test in other circumstances, in this context it was a part of a set of actions posing a threat to the disciplinary structure of [the police officer's] job," resulting in his expression not being insulated. *Id.* at 676. The court in *Berry* applied the *Pickering* balance to the police officer's speech as a whole, rather than to each component part.

campaign, in which the running of the police department is an issue, outweighs the appellee's interest in maintaining intra-departmental harmony where that criticism of the mayor necessarily carries some critical fallout on members of the police department who work with the mayor. The *Pickering* balancing test has been applied in this circuit to cases involving police officers both prior to, *see e.g., Waters v. Chaffin,* 684 F.2d 833 (11th Cir.1982); *Wilson v. Taylor,* 658 F.2d 1021 (5th Cir. 1981),[7] and subsequent to *Connick. See, e.g., McMullen v. Carson,* 754 F.2d 936 (11th Cir.1985); *Berry v. Bailey,* 726 F.2d 670 (11th Cir.1984), *cert. denied,* ..... U.S. ....., 105 S.Ct. 2326, 85 L.Ed.2d 844 (1985); *Leonard v. City of Columbus,* 705 F.2d 1299 (11th Cir.1983), *cert. denied,* ..... U.S. ....., 104 S.Ct. 3571, 82 L.Ed.2d 870 (1984). As we noted in *Waters,* although police officers need not suffer a "watered-down version" of their constitutional rights, "the state's interest in regulating its police force can be especially compelling." 684 F.2d at 836 (citations omitted).

The district court in our case, as required by *Connick* and these cases, focused part of its inquiry in this regard on the potential disruption within the police department stemming from the appellant's speech. Although an employer need not allow events to deteriorate to the point of actual disruption before taking action, the Court in *Connick* cautioned "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." 461 U.S. at 152, 103 S.Ct. at 1692-93, 75 L.Ed.2d at 723. Clearly matters directly affecting an electoral campaign go directly to the heart of the democratic electoral process, *see Leonard,* 705 F.2d at 1304, which requires that we give the utmost deference to the speech that is possible. By focusing on each "subject" of the poem individually, rather than the poem as a whole, the district court had a constricted picture of the relevant concerns — the court failed to account for the fact that the criticism of the

[7]As a decision of a Unit B panel of the former Fifth Circuit rendered after October 1, 1981, this decision is binding precedent in this circuit. *Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir.1982).

department members was entirely relevant to and inextricably intertwined with comment on the political campaign.

Once this factor is recognized, we conclude that a higher showing of potential disruption was required than was shown here in order to conclude that the appellee's interests outweighed the appellant's interests in his constitutionally protected speech. The unequivocal testimony adduced at trial was that the poem had only two potentially disrupting consequences. The first was that it precipitated an investigation into who was responsible for it comprising a sum total of approximately four to six hours work by two officers. This work was of the sort the officers might otherwise undertake, [Rec. at 323], and we perceive this effect to be of minor consequence. The second consequence was the possibility that the speech was perceived as exhibiting a general disrespect for fellow officers. This concern is associated with the paramilitary nature of a police department and the need to preserve departmental respect and discipline. But the need for discipline as an abstract concern should not be allowed to overshadow individual interests in free speech unless the department's "true interest" in suppressing the speech in this regard can be isolated and verified. *See Leonard,* 705 F.2d at 1305. *See also Williams v. Board of Regents,* 629 F.2d 993, 1002-03 (5th Cir.1980), *cert. denied,* 452 U.S. 926, 101 S.Ct. 3063, 69 L.Ed.2d 428 (1981).

Based upon the record adduced below, we view the potential for disruption of discipline from the poem to be much less than the appellee contends. Although some witnesses expressed concern over the need for discipline and respect within the department, that testimony was almost uniformly based upon assumption and speculation as to how the poem *might* have been perceived by other officers. Significantly, most of this testimony came from former aides, who obviously would not have the most objective of perceptions of the poem.[8] Even those former

[8]Along these same lines, we cannot help but observe that we found much of the aides' testimony to be simply incredible. For example, more than one testified that they construed the closing line in the poem, "Let's make Emory a memory," as possibly being a veiled assassination threat.

aides, however, could not point to any specific effect on the feelings or relationships between any other officers and the aides, other than their own feelings toward Eiland. We find it more probative to this issue that two officers who were not former aides testified that they had no knowledge of adverse effects or disruption flowing from the poem. These officers indicated that the poem was primarily viewed as humorous political expression aimed at the mayor that was not taken at face value and that did not affect how the aides were perceived.[9] Under these facts, it appears that the department's concern over effects from the poem on discipline and respect was more abstract than real.

Finally, in regard to potential disruption, the humorous aspect of the poem cannot be ignored. The district court found and the appellee urges that "strong, vituperative humor may also be potentially disruptive." While this is true, we think it simply ignores reality to not recognize that the humorous satire, as opposed to a direct attack posed in all seriousness, can lessen the confrontational aspect of a speaker's comments. This is especially true here since some of the most biting criticism utilized in the poem was merely a parody of the mayor's own words reported in the local news press earlier in the campaign.[10] The fact that the matter was said in jest, and was perceived by many as such, surely is relevant to the determination of how potentially disrupting or demoralizing it may have been.[11]

We think it is simply impossible under any reasonable construction of the poem to reach such an absurd conclusion, and such assertions do little to bolster these witnesses' testimony.

[9]*See* Rec. at 641; 644; 668-69; 673-74. In addition, Lt. David Green, who also apparently was not a former bodyguard, testified that he was unaware of any disruption. Rec. at 646.

[10]The reference to "dullards" in the poem stems from the mayor's response to charges of promotional favoritism published in the local media. The mayor was quoted as stating: "I try to select the best and the brightest. Obviously, I'm not going to select a dullard to be my aide." Plaintiff's Exhibit # 2. Furthermore, testimony at trial indicated "Let's make Emory a memory" was a campaign slogan seen on bumper stickers in Montgomery, and that "Emory Amin" was also a term sometimes used in description of the mayor.

[11]There was even testimony at trial that humor such as this was common

Weighing all of the factors present in this case, we conclude that the appellant's interests in speaking here outweighed the appellee's interests in suppressing that speech. On one hand, it is true that the appellant exercised his views in the workplace. Nevertheless, it only took minutes from his on-duty time to distribute the poem, and it was prepared before he went on duty. There was no actual disruption of either the appellants' own job performance or the general operation of the department, and we view the potential for disruption from the poem to be within acceptable limits, in light of the context in which the speech arose. In sum, the determinative factor in this case is that the main thrust of this poem was criticism of the mayor in the heat of a political campaign.

We emphasize this holding is a narrow one. We recognize and give appropriate weight to previous authority setting forth the need of police departments to secure discipline and efficiency as a quasi-military entity. But the speech here clearly involved an issue of intense public interest, and although there was some fallout on members of the police department, the brunt of that criticism was directed at and perceived as aimed at the mayor. Had the comments expressed by the appellant not occurred in the context of the mayoral election campaign, nor had they been relevant to an issue of public concern in that campaign, our result no doubt would be different. Nevertheless, we conclude that the appellant's interest in expressing his views of the imminent political campaign via the poem in question outweighed the appellee's interests in suppressing that speech.

IV.

[4] As we noted earlier, a plaintiff bears the initial burden of demonstrating that his speech was protected and that it was a substantial motivating factor in his discipline. Once shown, the task under *Mt. Healthy* is then to determine whether the

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and that it often was a means of releasing tension in the police department. As one witness testified, "If all I ever get called is a rat, I'm in good shape." Rec. at 672-73; 678.

employer would have taken the same action notwithstanding the protected speech. Ordinarily, this residual question is a factual question that the sole reason for Eiland's reassignment was his posting of the poem. The mayor, as well, clearly admitted as much, and appellee's counsel flatly admitted that "the undisputed evidence is the mayor says I reassigned him because of his reference to those other people." [Rec. at 702]. Having concluded that the poem was protected speech in its entirety and that all of the evidence adduced below was uncontradicted in indicating that the poem was the cause of Eiland's reassignment, we see no reason for retrial of this matter as to the second prong of the *Mt. Healthy* inquiry. The appellant's reassignment was constitutionally impermissible. Therefore, we remand only for determination of the appropriate remedy.[12]

REVERSED and REMANDED.

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[12]*Compare Leonard,* 705 F.2d at 1306 (reversing lower court's determination that speech was not protected; inasmuch as appellees had failed to even address whether appellant would have been discharged notwithstanding that speech, remanded solely for determination of remedy; bench trial); *Waters,* 684 F.2d at 840 (where the court on appeal found statements protected and they were the only asserted basis for discipline, the court remanded for determination of remedy; also bench trial).

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1144

In The
Supreme Court of the United States
October Term, 1986

THE CITY OF MONTGOMERY, *et al.*,
Petitioners,

vs.

STEPHEN A. EILAND,
Respondent.

ON APPEAL FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Should this Court deny certiorari of a judgment of the Eleventh Circuit Court of Appeals which (a) did not conflict with a decision of another federal appeals court or state court of last resort, and (b) decided a question of federal law which has been settled by this court?

2. Should this Court deny certiorari of a judgment of the Eleventh Circuit Court of Appeals as to which a petition for rehearing was denied without a request that said Court be polled?

3. Should this Court deny certiorari of a judgment of the Eleventh Circuit Court of Appeals which followed this Court's ruling in *Connick v. Myers,* 461 U.S. 138, 1035 S.Ct. 1684, 75 L.Ed.2d 708 (1983)?

PARTIES

The petitioners in this proceeding are Emory Folmar, Mayor of Montgomery, Alabama, and the City of Montgomery, Alabama, Defendants-Appellees in the District Court and the Court of Appeals.

The respondent in this proceeding is Stephen A. Eiland, Plaintiff-Appellant in the District Court and the Court of Appeals.

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STATEMENT OF THE CASE

On 24 October 1983, after he admitted to posting a poem at Montgomery police headquarters which criticized the mayor and his personnel policies, Corporal Stephen A. Eiland was demoted to the rank of police officer with a decrease in pay. He filed a lawsuit in January, 1984, charging the aforenamed defendants-petitioners with violations of the First, Fifth, and Fourteenth Amendments to the United States Constitution. He also named the Montgomery City-County Personnel Board as a party defendant, but moved to dismiss the Board before trial. The poem is reproduced at page 3 of the Petition for Certiorari.

After trial on 1-5 April 1985 on the First Amendment claim only, the Court considered briefs from both sides as to whether the poem was constitutionally protected as a matter of law. In a conference in chambers, the Court indicated that it would make a finding of law that the poem had two subjects—one of which, the mayor, was constitutionally protected while the other of which, i.e. the bodyguards, was not.

During the chambers conference, counsel for the Plaintiff *and* the Defendants objected to the Court's division of the poem into two different subject matters. Counsel for the Plaintiff argued that the poem should be treated as a writing about the mayor in its totality and that, as a matter of law, it was constitutionally protected. Counsel for the Defendants argued that the poem was a writing about the mayor's bodyguards (Eiland's fellow police officers) and that, as a matter of law, it was not constitutionally protected.

Before the jury was instructed, the Court issued an Order on 4 April 1985, including that legal finding, which served as one of the premises of its jury charge. That Order is reproduced at page A-1 through A-9 of the Petition for Certiorari.

In its charge to the jury, the Court instructed them as a matter of law that "references in Eiland's poem to Mayor Folmar" were constitutionally protected, while "the reference in Eiland's poem to the mayor's aids or bodyguards was not constitutionally protected speech". The jury was then instructed to make a finding of fact as to the reason for Eiland's discipline—either for references to the mayor or references to the bodyguards. The Court did not identify, specify, or otherwise define in its Order or in its charge which words, lines or phrases referred to the mayor or which words, lines or phrases referred to the bodyguards. The jury found in favor of the Defendants, and the Plaintiff appealed the Court's judgment.

Applying the plain error standard of review, the Eleventh Circuit Court of Appeals reversed the District Court and remanded for a determination of the appropriate remedy. On remand, the Court determined that Eiland was entitled to reinstatement to his position as corporal and to backpay totalling $12,187.97. Eiland was reinstated effective 1 January 1987, and the award of backpay and damages has been suspended pending this Court's disposition of the Petition of Certiorari.

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SUMMARY OF ARGUMENT

The petitioners' request for Writ of Certiorari should be denied because (1) the court of appeals followed this Court's ruling in *Connick v. Myers,* 461 U.S. 138, 1035 S.Ct. 1684, 75 L.Ed.2d 708 (1983), (2) the judgment of the court of appeals does not conflict with decisions of other federal appeals courts, (3) the court of appeals decided a federal question which has been settled by this Court, and (4) the court of appeals correctly held that the poem was a constitutionally protected writing in its totality.

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ARGUMENT

I. The Court Of Appeals Decision Did Not Conflict With Other Federal Appeals Courts And It Decided A Question Of Federal Law Which Has Been Settled By This Court.

Two of the considerations this Court makes in determining whether to grant certiorari review are the extent to which a difference of opinion or interpretation exists among the circuit courts of appeal and whether the question of federal law has been settled by this Court. Rule 17, Rules of the Supreme Court of the United States. Application of those considerations to the instant case portends a denial of the petition.

This Court has declared that "[f]or at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.

Connick v. Myers, supra, at 1687.[1] Thus, the state's interests and the employee's interests in such cases have been well-defined and consistently articulated for two decades now.

The decisions which this Court has promulgated in the interim have not changed *Keyishian's* mandate, and one year after *Keyishian, supra,* this Court established the analytical framework within which first amendment issues are resolved in *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). *Pickering's* standards have been consistently upheld.

Although *Pickering* was followed by several landmark first amendment decisions in this Court,[2] the assumption of jurisdiction in those instances has been designed to correct a misapplication below or to confirm a correct application below, not to resolve a dispute among circuits or to interpose new standards.

Only causation, as an analytical component, has been treated with new blood since *Pickering.* In *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), this Court established the "but for" test to be applied once the *Pickering* balancing tests have been considered. The court of

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[1]Citing *Keyishian v. Board of Regents,* 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629 (1967).

[2]See *Police Department of Chicago v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Givhan v. Western* Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); *Carey v. Brown,* 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

appeals correctly determined that application of *Mt. Healthy* was not warranted because "all of the evidence adduced below was uncontradicted in indicating that the poem was the cause of Eiland's reassignment" *Eiland v. City of Montgomery*, 797 F.2d 953, 960 (11th Cir. 1986); See Petition for Certiorari, at A-24.

The several courts of appeals, by now well-acquainted with first amendment analysis, have followed the mandates of this Court. Any differences among them are not attributable to inconsistent standards, but rather to the "obligation [in first amendment cases] to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984).[3]

II. The Eleventh Circuit Decision Is A Firm Decision Which Reflects An En Banc Determination Of The Issues.

The Suggestion for Rehearing En Banc was denied in the court of appeals. Rule 26, Rules of the United States Court of Appeals for the Eleventh Circuit. Of the three possible procedures which lead to such denials in the Elev-

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[3]See *Fiorillo v. U.S. Dept. of Justice, Bureau of Prisons*, 795 F.2d 1544 (Fed. Cir. 1986); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985); *Wren v. Spurlock*, 798 F.2d 1313 (10th Cir. 1986); *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986); *Zaky v. U.S. Veterans Administration*, 793 F.2d 832 (7th Cir. 1986); *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986); *McAdams v. Matagorda County Appraisal District*, 798 F.2d 842 (5th Cir. 1986); *Johnson v. Town of Elizabethtown*, 800 F.2d 404 (4th Cir. 1986); *Gaj v. U.S. Postal Service*, 800 F.2d 64 (3rd Cir. 1986).

enth Circuit, the route taken by the court in this case placed the imprimatur of every "Judge in regular service on the Court" upon an already strong, unequivocal decision. See Appendix, at A-1, *infra.*

None of the active appellate judges even *requested* that the court be polled on the rehearing request. Thus there is apparently no doubt in the circuit about the standards which should have been applied or the wisdom of the panel's application.[4]

This Court should deny the petition for this reason as well.

III. The Court Of Appeals Decision Followed This Court's Ruling In Connick v. Myers.

Connick v. Myers, supra, did not create new case law, overrule previous decisions or set new standards for judicial analysis of the constitutional protection to be afforded to statements made by public employees. Instead, the decision reiterated and affirmed this Court's well-established, individualized approach to First Amendment analysis most memorably articulated in *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

For purpose of the case *sub judice,* the most important component of the *Connick* analysis is that this Court *did*

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[4]The court of appeals noted that its pre-*Connick* and post-*Connick* analyses were consistent. 795 F.2d at 958. Significantly, this Court has left undisturbed some of the Eleventh Circuit's post-*Connick* rulings. See *Berry v. Bailey,* 726 F.2d 670 (11th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 2326; 85 L.Ed.2d 844 (1985); *Leonard v. City of Columbus,* 705 F.2d 1299 (11th Cir. 1983), *cert. denied,* 468 U.S. 1204, 104 S.Ct. 3571, 82 L.Ed.2d 870 (1984).

not assess the constitutional protection to which the individual questions on the Myers questionnaire were entitled. The Court's consideration of individual questions was for the sole purpose of determining the extent to which each addressed a matter of public concern, *not* to bestow incidental constitutional protection upon each inquiry, as the District Court did in the instant case.

The court of appeals found that "the district court started its analysis on the wrong foot by determining that the poem had two distinct and separable subjects". 797 F.2d at 957. (Petition for Certiorari, p. A-18). Further, the court of appeals correctly concluded that "[t]he *Connick* decision . . . did not apply the *Pickering* balancing test to each individual question . . ., but rather, the [Supreme] Court appeared to weigh the first amendment interests of Myers *in the questionnaire as a whole* against the interests of *Connick*". 795 F.2d, *supra*. [Emphasis supplied].

Of equal significance is *Connick's* perpetuation of the principle that first amendment analyses are not formulaic.[5] Citing *Pickering, supra,* at 1735, this Court confirmed that

> "[b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged". *Connick, supra,* at 1694.

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[5]The Eleventh Circuit was not alone in its ban on topical dissection of writings before application of the *Pickering/Mt. Healthy* tests. In *Fiorillo v. U.S. Dept. of Justice, Bureau of Prisons, supra,* a public employee's statements to the press were analyzed as a whole, rather than on a sentence-by-sentence basis. 795 F.2d at 1550.

The district court's departure from the holistic approach embraced by this Court led to its erroneous application of *Pickering, Mt. Healthy,* and *Connick.* The court of appeals reinstated the appropriate analysis under which constitutional protection to the *whole* of Corporal Eiland's poem was inevitable.

CONCLUSION

The Petitioners have proffered no good and substantial reason why this Court should grant the petition. Instead, the proper interpretation of first amendment decisions was applied in the court of appeals in an opinion which was apparently unanimously received in that court and which created no conflicts with other circuits.

The law is well-settled, and the petition should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7295

STEPHEN A. EILAND,

Plaintiff-Appellant,

versus

THE CITY OF MONTGOMERY, a municipal corporation; and EMORY FOLMAR, Ind. and in his official capacity as Mayor of the City of Montgomery,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 26, 11 Cir., 1986, — F.2d —).
(OCT 6 1986)

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge